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No. 97-1411

In The

Supreme Court of the United States

October Term, 1997

NORTH TEXAS STEEL COMPANY, INC.,

Petitioner,

vs.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution permits an Indiana court to exercise personal jurisdiction, established via minimum contacts analysis, via transient jurisdiction analysis, or via waiver or estoppel, over the Texas corporation who manufactured the product at issue in the case knowing the product would be shipped to, installed and used in Indiana?

PARTIES TO THE PROCEEDING

Respondent, R.R. Donnelley & Sons Company, has no parent companies. R.R. Donnelley & Sons Company has the following non-wholly owned subsidiaries: 77 Capital Partners II, L.P.; 77 Capital Partners, L.P.; AlphaGraphics, Inc.; Arnowitz Studios; Canto, Inc.; Donnelley Enterprise Solutions Incorporated; Donnelley Spatial Data (a General Partnership); GeoSystems Global Corporation; GeoSystems, Inc.; Hands on Technology; Housenet, Inc.; Infonautics Corporation; IntelliQuest Information Group, Inc.; Intervisual Communications, Inc.; MedAccess Inc.; MediaTel Corporation; Metromail Corporation; Modus Media International Holdings, Inc.; Multex Systems, Inc.; Global Directory Services Company; Pacific Magazines & Printing Limited; Siegwerk, Inc.; Stream International Inc.; Tata Donnelley Limited; ViewPoint Information Systems, Inc.

Petitioner is North Texas Steel Company, Inc. Respondent is not aware of any parent companies or non-wholly owned subsidiaries of Petitioner.

Other companies named as defendants in the state trial court have since been dismissed and were not named parties before the Indiana Court of Appeals whose judgment is sought to be reviewed.

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JURISDICTION

The United States Supreme Court lacks jurisdiction to review this appeal. The United States Supreme Court's jurisdiction over appeals from state courts is limited by federal statute:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treatises or statutes of . . . the United States.

28 U.S.C. § 1257(a).

"This provision establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, ___ U.S. ___, 139 L.Ed.2d 433, ___, 118 S.Ct. 481, ___, 1997 U.S. LEXIS 7494 at *12 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' " *Id.* (citing *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770 (1945)). The finality rule should not be easily scorned. *Id.* In this case, no final judgment or decree, by the highest court of a State in which a decision could be had, has been rendered.

A. THE RULING IS NOT A FINAL JUDGMENT OR DECREE

1. The ruling is not final; it is interlocutory

As North Texas Steel correctly notes in its jurisdictional statement, after the trial court denied its motion to dismiss for lack of personal jurisdiction, North Texas Steel chose to seek an interlocutory appeal to the intermediate state appellate court. Under Indiana appellate rules, such an appeal is discretionary in two respects: the interlocutory appeal must be approved by both the trial court and the appellate court. Ind.A.R. 4(B)(6). Interlocutory appeals are limited to issues raised in the order which is certified for interlocutory appeal. *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 386 (Ind. 1997). There can be no dispute that the ruling on the personal jurisdiction issue was an interlocutory decision of the trial court. Neither the trial court nor the Indiana Court of Appeals had to grant North Texas Steel's request to certify the appeal. The Indiana courts just as properly could have made North Texas Steel wait until the end of the case at the trial level, before seeking any appellate review of the personal jurisdiction decision. By analogy, *see Johnson v. Fankell*, ___ U.S. ___, 138 L.Ed.2d 108, 117 S.Ct. 1800, 1997 U.S. LEXIS 3547 (1997) (holding § 1983 defendant did not have a right to interlocutory appeal in state court action even though federal court provided such right). Merely permitting early review does not convert an interlocutory ruling into a final one.

Traditionally, a judgment that denies dismissal is not final, even if the question involves the jurisdiction of the state courts. *See, e.g., Southern Pacific Co. v. Gileo*, 351 U.S.

493, 496, 100 L.Ed. 1357, 76 S.Ct. 952, 955 (1956) (no final judgment where issues of negligence and damages remained to be tried, but final judgment where negligence and damages stipulated). Under the traditional approach of this Court, the interlocutory judgment finding personal jurisdiction is not final as both liability and damages remain to be tried before a jury.

2. None of the *Cox Broadcasting* exceptions to the final judgment rule apply here

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485, 43 L.Ed.2d 328, 95 S.Ct. 1029, 1037-1041 (1975), this Court listed four situations where a state court ruling would be considered final even if further proceedings are left to occur in the case. Assuming without conceding the continued vitality of *Cox Broadcasting*'s breadth in light of *Jefferson*, none of the following exceptions would apply in this case:

(i) Resolution of the federal issue is determinative of the entire case.

This is not a situation where a decision on personal jurisdiction is outcome determinative and "there is nothing more to be decided". *Id.* 420 U.S. at 479 n.8, 95 S.Ct. at 1038 n.8. Rather, the entire case remains for trial.

(ii) The federal issue will survive and require a decision regardless of the outcome of future proceedings.

Several reasons prevent the application of this exception here. First, this exception cannot receive broad application without largely vitiating the statute's requirement

of a final judgment. As a general matter, federal issues do not arise only, or even usually, at the end of a case when final judgment is entered. Rather, they arise throughout the litigation. The door for interlocutory Supreme Court review under this exception should not be opened, just because a party losing an interlocutory federal issue will likely appeal the loss at the end of the case. Such a rule in effect says a final judgment exists every time a federal issue is resolved which may later be appealed. Therefore, the scope of this exception must remain limited.

Second, a factor underlying this exception (and which may help confine it) is that there is no reason to wait because the remaining state court proceedings "could not remotely give rise to a federal question". *Id.*, 420 U.S. at 480, 95 S.Ct. at 1039. Thus, a better reading of the exception is that it will apply only where there is no chance of other federal issues arising. Here, the entire case awaits and it is certainly too early to posit that no other federal issues could arise.

Third is the simple proposition that North Texas Steel can appeal the adverse ruling at the end of the case, the normal appellate route. North Texas Steels fails to identify any reason why it is better to stretch statutory language and decide the appeal now as opposed to at the end of the case. It has been noted that all of the cases cited in *Cox Broadcasting* "arguably involved elements of hardship in addition to the simple burden of proceedings that might prove unnecessary." 16B Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 4010, p. 174 (1996) (noting the second finality exception would be more convincing if restricted to hardship situations).

Waiting until a final judgment is entered will not seriously prejudice North Texas Steel as it submitted no argument or evidence of difficulty or hardship in litigating the case in Indiana. North Texas Steel has had Indiana counsel since the beginning of this case, and even before suit was filed it participated in mediations in Indiana. (R. 397). Neither is judicial economy favored by exercise of jurisdiction at this time; for even if this Court reviews the minimum contacts analysis of the state court, unless this Court also addresses the alternative arguments regarding transient jurisdiction and waiver or estoppel, granting certiorari and affirming the Indiana court will still disrupt the progress of the case toward trial by distracting the litigants, and reversal of the Indiana court will also lead to further proceedings below on the alternative arguments raised.

Fourth, there is no certainty the federal issue will survive future proceedings; North Texas Steel may win at trial and moot the need for this Court to address a constitutional issue. Similar to *Jefferson*, where resolution of state claims could effectively moot the federal law question, it is too early to address the correctness of the state appellate court's ruling. *See Jefferson*, 1997 U.S. LEXIS 7494 at *14-16.

Fifth, Supreme Court case law does include instances where the Court reviewed interlocutory personal jurisdiction decisions. *Calder v. Jones*, 465 U.S. 783, 788 n.8, 79 L.Ed.2d 804, 104 S.Ct. 1482, 1485 n.8 (1984) (collecting cases). However, those cases are distinguishable from this one with regard to determining finality. In *Calder*, the Court found the California court's decision was final because it was not subject to further review in the state

courts. *Id.* The same was found in *Shaffer v. Heitner*, 433 U.S. 186, 195-196 n.12, 53 L.Ed.2d 683, 97 S.Ct. 2569, 2575-2576 n.12 (1977). As noted herein, further review is possible. In *Rush v. Savchuk*, 444 U.S. 320, 323, 62 L.Ed.2d 516, 100 S.Ct. 571, 575 (1980), the Court accepted jurisdiction without comment or discussion (perhaps the issue was not raised) and the Minnesota Supreme Court did not expound on how the case came before it other than to say it was an appeal, 311 Minn. 480, 483, 245 N.W.2d 624, 627 (1976); however, the issue arose on a garnishment complaint and there appeared little else for the state trial court to resolve once it found jurisdiction to allow garnishment. *See Cox Broadcasting*, 420 U.S. at 479, 95 S.Ct. at 1038 (exception one). Here, exception one is inapplicable. In the other cases cited in *Calder*, the issue was raised by requesting a writ of either prohibition or mandamus. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289, 62 L.Ed.2d 490, 100 S.Ct. 559, 563 (1980) (writ of prohibition); *Kulko v. California Superior Court*, 436 U.S. 84, 88, 56 L.Ed.2d 132, 98 S.Ct. 1690, 1695 (1978) (writ of mandate). Issuance of such a writ is distinct from an interlocutory appeal in its finality.

(iii) Later review of the federal issue cannot be had.

North Texas Steel has the right to an appeal of the final judgment entered in this case. Ind.A.R. 4(A); 28 U.S.C. § 1257(a).

(iv) Resolution of the federal issue would preclude any further litigation rather than just control the nature and character of proceedings.

This is not a case where if North Texas Steel prevailed on the ruling no trial would be held anywhere.

Nor would the remaining issues in litigation wither away. At most, a ruling in favor of North Texas Steel would only alter the forum.

B. THE RULING WAS NOT RENDERED BY THE HIGHEST COURT IN INDIANA IN WHICH A DECISION COULD BE HAD

North Texas Steel could have made the ruling on personal jurisdiction a final judgment. It did not. By challenging the trial court's personal jurisdiction ruling by interlocutory appeal rather than by original action for writ of prohibition to the Indiana Supreme Court, North Texas Steel ordained that this would be an interlocutory appeal rather than an original action finally determined by the Indiana Supreme Court. The Indiana Constitution, *IND CONST art. 7, § 4*, the Indiana Rules of Appellate Procedure, *Ind.App.R. 4(A)(5)*, and the Indiana Rules of Procedure for Original Actions, *Ind.Orig.Act.R. 1(A) and (B)*, are consistent in providing "exclusive" and "original" jurisdiction over personal jurisdiction issues in the Indiana Supreme Court by way of writs of mandamus or prohibition. (The text of these provisions are set forth at A-5 of Petitioner's brief.) R.R. Donnelley raised below the issue of the intermediate appellate court's power to decide the issue on appeal but was unsuccessful. Pet'r.Br. A-5-A-7. By taking the appellate route (even if that route is a permissible one under Indiana law – as the Indiana Court of Appeals found), North Texas Steel chose to raise the issue in interlocutory fashion. Because the decision was interlocutory and rendered by an intermediate appellate court, it is neither final nor a judgment of the highest court from which a decision could be had. One of the

important policies underlying this requirement is that interference with state courts "is reduced to a minimum by affording every opportunity for correction of error by the state courts themselves." 16B Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 4007, p. 131 (1996). The presence of a possibility of the Supreme Court's ruling becoming moot and advisory, if not a jurisdictional bar under 28 U.S.C. § 1257, cautions against review as a discretionary matter.

C. INDEPENDENT AND ADEQUATE STATE GROUNDS

After the adverse decision by the Indiana Court of Appeals, North Texas Steel filed a petition to transfer the appeal to the Indiana Supreme Court, a discretionary review similar to a petition for writ of certiorari. Ind.A.R. 11(B). The Indiana Supreme Court denied the petition to transfer without stating any reasons for doing so. One possibility is that the Indiana Supreme Court believed the sole proper route to raise a personal jurisdiction issue was by original action for writ of prohibition. If the reason for denial of the petition to transfer was because North Texas Steel took the wrong path, such reason is an independent state law basis for not reviewing the lower court's decision. *See Coleman v. Thompson*, 501 U.S. 722, 729, 115 L.Ed.2d 640, 111 S.Ct. 2546, 2553-2554 (1991). Because this possibility exists, the petition for writ of certiorari should be denied for lack of jurisdiction.

STATEMENT OF THE CASE

North Texas Steel takes liberties in stating the evidence as presented to the trial court, found by the trial court, and found by the Indiana Court of Appeals. North Texas Steel waived the right to contest the factual findings of the trial court and certainly does not present the facts most favorable to the ruling. North Texas Steel presents facts irrelevant to the personal jurisdiction issue, and omits facts which are relevant to determining personal jurisdiction, including transient jurisdiction and waiver or estoppel in addition to finding minimum contacts. The procedural history is accurate.

A. WAIVER

First, North Texas Steel waived the right to contest facts most favorable to the finding of personal jurisdiction because it did not raise "sufficiency of the evidence" or "clearly erroneous findings of fact" arguments in the state appellate courts. (Appellant's Br. In Ind.Ct.App. pp. 2, 16-17). Therefore, the facts found by the trial court must be taken as true. That is exactly what the Court of Appeals did in its opinion. The issue raised by North Texas Steel is a question of law, and it may not now argue that this Court should consider or weigh conflicting facts different than done below.

B. MATERIAL UNDISPUTED FACTS

1. Minimum Contacts

North Texas Steel specifically manufactured a rack system for RRD's Warsaw, Indiana, plant. North Texas

Steel manufactured, sold, and shipped a product to Indiana. (R. 180-182 (William Mascharka (president of Fraizer Industrial Company) Aff. ¶¶ 5-9)); *North Texas Steel Company, Inc. v. R.R. Donnelley & Sons Company*, 679 N.E.2d 513, 519 (Ind.Ct.App. 1997). The storage racks were specifically designed and built for the Warsaw, Indiana plant. (R. 118, 135-153). North Texas Steel "knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana." (R. 80 (Judd affidavit ¶ 19)).

2. Transient Jurisdiction

Robert P. Judd, president of North Texas Steel, appeared voluntarily in Indiana on April 26, 1996, at the trial court's hearing to testify on defendants' motion for change of venue. (R. 9, 332-333). He was listed and appeared as a witness for North Texas Steel on a motion for change of venue. (R. 564-565). Counsel for North Texas Steel asked Mr. Judd to give testimony on the motion for change of venue. (R. 333). He was not appearing for the jurisdiction issue, and he was not called as a witness for any other party. Mr. Judd was not expected to, and did not testify on North Texas Steel's motion to dismiss for lack of personal jurisdiction. In fact, when R.R. Donnelley's counsel mentioned service of the summons, counsel for North Texas Steel objected on grounds that it was not relevant to the change of venue issue for which Mr. Judd was testifying. (R. 337-338).

Mr. Judd appeared in Indiana voluntarily without subpoena, and for his company's benefit. (R. 338). While

Mr. Judd was in the Kosciusko County, Indiana, courtroom on April 26, 1996, counsel for R.R. Donnelley made a second service of summons and the amended complaint upon North Texas Steel by personally handing the papers to Mr. Judd at the venue hearing pursuant to Indiana Trial Rules 4.4(B)(1), 4.1(A)(2), and 4.6(A)(1). (R. 9, 331).

3. Waiver or Estoppel to Deny Personal Jurisdiction

North Texas Steel's first affirmative defensive move in this case was on January 8, 1996, when it invoked the Indiana court's power by noticing depositions and subpoenaing deponents. (R. 255-260). On January 8, 1996, North Texas Steel noticed two depositions of R.R. Donnelley's expert consultants, Wes Midgley and Ken Wood. (R. 255, 257). Deposition notices are governed by Indiana Trial Rule 30 which permits the attendance of non-party witnesses to "be compelled by the use of a subpoena as provided in Rule 45." Each notice contained a proof of service. (R. 256, 258). Proof of service of a notice to take a deposition constitutes authorization for the Court to issue subpoenas. T.R. 45(D)(1).

Accompanying each notice was a subpoena issued from the Kosciusko County Circuit Court pursuant to Trial Rule 45. *See* (R. 259, 260). Each subpoena consisted of two Court orders: an order for the witness to appear to testify and an order for the witness to produce documents or tangible things as described on the subpoena. *Id.*

The purpose of the depositions was for litigating the merits of the case. The subpoenas themselves call for the

experts' files "concerning your investigation you performed . . . and authorities which you relied upon in reaching your opinion or conclusion in this case". *See* (R. 259, 260). Obviously, the experts were not likely to be testifying on facts significant to jurisdictional issues. The two experts are knowledgeable in *inter alia* the design and construction of storage rack systems. *See* (R. 261-263 and R. 264-265). The collapse of storage racks is the main focus of the factual merits of this case. (R. 12) (Complaint ¶ 27); (R. 116) (Am. Compl. ¶ 27). It was not until January 25, 1996, that North Texas Steel first raised the personal jurisdiction issue by filing a motion to dismiss. (R. 6).

North Texas Steel hired Indiana counsel (Indiana counsel was the one who noticed the depositions and had subpoenas issued) who participated in several attempts to resolve the dispute on an amicable basis including a two day mediation in Indiana pursuant to the Indiana Rules for Alternative Dispute Resolution. (R. 397).

REASONS FOR DENYING THE PETITION

A number of good reasons exist for this Court in its discretion to deny the petition for a writ of certiorari. North Texas Steel's reason why this Court should grant the petition centers on differing views (in state courts, federal appellate courts, and this Court) of the stream of commerce theory for establishing personal jurisdiction. The existence of these differing views is without dispute. Nevertheless, North Texas Steel has not shown how resolution of the splintered views would matter in this case,

particularly in light of this Court's questionable jurisdiction over this case all which may lead to a fractured decision without all justices even reaching the merits.

A. LACK OF IMPORTANCE TO THE INDIANA SUPREME COURT

Like this Court, the Indiana Supreme Court could have reviewed North Texas Steel's arguments. Exercising its discretion, it declined review. If the Indiana Supreme Court did not decline review based on the state procedural ground that North Texas Steel chose the wrong path, then the Indiana Supreme Court must have thought the personal jurisdiction issue was not important enough or contrary to substantial authority sufficient to accept transfer. The decision below gave full consideration to the arguments raised and decided the issue correctly.

B. LACK OF SPECIFIC CONTRARY OPINION IN ANY OTHER COURT

Any decision involving personal jurisdiction is necessarily fact bound. Therefore, to merit review North Texas Steel must show that the facts of this case are "typical" or recur frequently in the course of interstate business. But North Texas Steel presents no basis for believing this is a typical case. Importantly, North Texas Steel's petition fails to identify a single opinion from any state or federal court which is factually indistinguishable from this case. No case is presented as deciding these facts directly contrary to the way the Indiana Court of Appeals did. Either the facts are not typical, or the issue is not as

important as North Texas Steel argues. The decision did not hinge on adopting one theory over another. Rather, the Indiana Court of Appeals simply applied uncontroversial propositions of law to the facts of the case.

C. THE INDIANA COURT'S OPINION IS CONSISTENT WITH PRECEDENT

This is an easy case. The primary basis for the decision is that North Texas Steel "knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana." (R. 80); *North Texas Steel*, 679 N.E.2d at 519; (R. 468). That fact distinguishes this case from those where it was the random or fortuitous acts of the user who took the product to another state. Instead, North Texas Steel manufactured the product knowing it was for ultimate use in Indiana, and then shipped the product to Indiana. That a court would rely on the statement of North Texas Steel's own president, (R. 80), is not astonishing.

The Indiana Court of Appeals was faithful to the United States Supreme Court precedent of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980) and *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 94 L.Ed.2d 490, 107 S.Ct. 1026 (1987). The Indiana Court of Appeals obviously considered both authorities because both were cited in their proper context in the opinion. *See North Texas Steel*, 679 N.E.2d at 518 and 519.

The opinion is consistent with those and other precedents. The lower courts rejected North Texas Steel's claim that its contact with Indiana was "random, fortuitous, or

attenuated". The facts established more. It was not just foreseeable that the storage racks might end up in Indiana and subject North Texas Steel to liability here. The act of manufacturing and shipping was done with the knowledge that the racks were for use by R.R. Donnelley in Indiana, and nowhere else. This is specific effort and choice by North Texas Steel to serve the Indiana market with its product. North Texas Steel does not point to controlling precedent that was missed by the parties and the Court.

Looking at the point another way, if North Texas Steel did not reasonably expect to be hailed into court in Indiana if its product failed while being used in Indiana, the one state where it knew and expected the product would be used, where else did it expect to be sued for product liability? Purposeful availment of the Indiana economic market, even if there is no physical presence in Indiana, properly results in the injured party's availment to Indiana courts for remedy. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 119 L.Ed.2d 91, 112 S.Ct. 1904, 1910 (1992). The trial court and the court of appeals drew the appropriate line under this Court's precedent. This Court does not need to reexamine such precedent to decide this case.

Even assuming *arguendo* that in order to decide this case this Court would need to determine questions involving the stream of commerce theory, North Texas Steel fails to present a reasonable basis for finding no personal jurisdiction in this case under any arguable application of a stream of commerce theory. Once again, North Texas Steel has failed to offer even one federal or state case similar to this one that applies any form of

stream of commerce theory and finds personal jurisdiction lacking. Thus, the stream of commerce issue may be unsettled, but this is not the case that would be able to settle it.

D. ALTERNATIVE GROUNDS EXIST FOR FINDING PERSONAL JURISDICTION

As alternate reasons to deny the petition for writ of certiorari, R.R. Donnelley submits there are two alternative grounds to affirm the finding of personal jurisdiction in Indiana. Personal jurisdiction was established by way of transient jurisdiction, and personal jurisdiction was established by waiver or estoppel. Although these grounds for the decision were ignored as moot by the Indiana Court of Appeals, 679 N.E.2d at 519 n.5, this Court may deal with the merits of these questions or remand for initial consideration by the Indiana courts. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 25 L.Ed.2d 491, 90 S.Ct. 1153, 1156 n.6 (1970). Because a determination of the minimum contacts question in petitioner's favor would not resolve the personal jurisdiction issue, ultimate resolution of the question bears only marginally on the issue, and therefore is not a good candidate for certiorari.

1. Transient Jurisdiction

Briefly, personal jurisdiction can be obtained over a nonresident when the nonresident is physically present within the forum state. In a unanimous decision, the United States Supreme Court upheld jurisdiction over a

nonresident where the nonresident was served a summons and divorce petition while he was physically present in the forum state. *Burnham v. Superior Court of California*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990). "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Burnham*, 495 U.S. at 610, 110 S.Ct. at 2110 (plurality opinion). Furthermore, the Court rejected the "minimum contacts" analysis when confronted with physically present defendants:

> The logic of the *Shaffer* holding . . . does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum," and nothing in *Shaffer* expands that requirement beyond that.

Burnham, 495 U.S. at 621, 110 S.Ct. at 2116 (citations omitted).

A physically present defendant provides personal jurisdiction even if there are *no contacts* with the former state. Here, Mr. Judd, president of North Texas Steel, was voluntarily present in the forum and was personally served with process while present in the forum on behalf of North Texas Steel for the venue hearing only. If not established before, personal jurisdiction attached at the time of personal service of process.

2. Waiver or Estoppel to Deny Personal Jurisdiction

"[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 704, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2105 (1982). Like all personal privileges, personal jurisdiction "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 84 L.Ed. 167, 60 S.Ct. 153, 155 (1939); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180, 61 L.Ed.2d 464, 99 S.Ct. 2710, 2715 (1979). "The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *Insurance Corp. of Ireland*, 456 U.S. at 704, 102 S.Ct. at 2105. Waiver of a personal privilege respecting the place of suit will have occurred when the merits of the case are reached. *See Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 180, 73 L.Ed. 252, 49 S.Ct. 98, 99 (1929). More basically, personal jurisdiction will exist where there is:

> some act by which the defendant **purposefully avails itself** of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228, 1240 (1958) (emphasis added).

"A party need not actually file an answer or motion before waiver is found." *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732-733 (7th Cir. 1990).

The United States Supreme Court "has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." *Insurance Corp. of Ireland*, 456 U.S. at 704, 102 S.Ct. at 2105 (citing *Adams v. Saenger*, 303 U.S. 59, 67-68, 82 L.Ed. 649, 58 S.Ct. 454, 458 (1938) and *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30, 61 L.Ed. 966, 37 S.Ct. 492, 493 (1917)); *Western Life Indemnity Company of Illinois v. Rupp*, 235 U.S. 261, 272, 59 L.Ed. 220, 35 S.Ct. 37 (1914). However, regardless of whether federal or state law determines when a party has waived or is estopped from asserting lack of personal jurisdiction, North Texas Steel has waived or is estopped from claiming jurisdiction is lacking.

Before North Texas Steel raised the affirmative defense of lack of personal jurisdiction, North Texas Steel purposefully availed itself of the affirmative power and procedure of the Indiana courts by subpoenaing expert witnesses for deposition and document production. By doing so, North Texas Steel cannot now claim Indiana lacks jurisdictional power over it because it has taken advantage of such power for its own benefit.

Issuance of a subpoena is an exercise of the court's power and authority to require compliance under threat of contempt. By calling on the subpoena power of the trial court backed by the authority to hold disobedience in contempt, North Texas Steel "purposefully availed itself" of the judicial powers available in this jurisdiction. Seeking to depose R.R. Donnelley's two experts is a significant step, perhaps the most significant step, in the litigation of and defense on the merits of this case. Once

invoking the power of Indiana's courts, North Texas Steel cannot now argue that Indiana has no jurisdiction.

CONCLUSION

For the foregoing reasons, North Texas Steel's petition for writ of certiorari should be denied.

Respectfully submitted,

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